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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER PHILIP BRENDALE

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QUESTIONS PRESENTED

1. In 1877, Congress enacted the Dawes Act, 25 USC 331, *et seq.*, and land within the Yakima Indian Reservation was allotted to individual tribal members. The land remained in trust for twenty-five (25) years, then a fee simple patent was issued to the individual Indian allottee free from any encumbrance or restriction on alienability. 25 USC 348. After issuance of a fee simple patent, the allottee was subjected to the civil and criminal laws of the state in which he resided. 25 USC 349.

In 1963, the State of Washington, acting pursuant to Public Law 280 (25 USC 1360) assumed full criminal and civil jurisdiction over reservation land not held in trust for the benefit of individual Indians or the Yakima Nation.

Does the allotment and issuance of a fee simple patent for Petitioner's land within the Yakima Indian Reservation pursuant to 25 USC 331, *et seq.*, together with Washington's further assumption of full criminal and civil jurisdiction over all non-trust land within the Yakima Reservation divest the Yakima Nation of authority to exclusively regulate use or zone land use on Petitioner's deeded, fee-owned, non-trust land within the Yakima Indian Reservation?

2. Does Yakima County exercise of land use-zoning jurisdiction over deeded, fee-owned, non-Indian land including Petitioner-Brendale's proposed subdivision of twenty (20) acres of his deeded, fee-owned, non-trust land (all within the "closed area" of the Yakima Indian Reservation) threaten the political integrity, economic security, general health and welfare of the Yakima Indian Nation?

3. Does subjecting Petitioner's fee simple owned land to Yakima Nation rather than Yakima County land use regulation based on its location within the "closed area" as well as the Yakima Nation's 1955 tribal resolution and the BIA's 1972 "Public Notice" creating the "closed area" violate Petitioner's constitutional due process and equal protection rights?

PARTIES TO THE ACTION

This action (No. 87-1622) (referred to in the Court of Appeals as "*Whiteside I*") involves Petitioner-Philip Brendale, Yakima County, its Commissioners, Jim Whiteside, Graham Tollefson and Charles Klarich, Planning Department Director, Richard F. Anderwald, and the Confederated Bands and Tribes of the Yakima Indian Nation (herein "Yakima Nation").

The case with which this action has been consolidated, *Confederated Bands and Tribes of the Yakima Indian Nation vs. County of Yakima, et al.* (*Whiteside II*), (Nos. 87-1697, 87-1711), involves the Yakima Nation, Yakima County, the Commissioners and Planning Director named above, Stanley Wilkinson, Jim Gatliff and Dick Keller.

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BRIEF OF PETITIONER PHILIP BRENDALE

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was filed September 21, 1987, is reported in 828 F.2d 529 and is printed in the "Appendix to Petition for Writ of Certiorari" of Philip Brendale (herein "BA") 1-39. Timely Petitions for Rehearing by Petitioner-Brendale (*Whiteside I*) and Yakima County (*Whiteside II*) were denied by "Order" filed 1/13/88 (BA 217). The Decision of the District Court, entered September 11, 1985, is reported in 617 F.Supp. 735 (BA 64-128).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 USC 1254 and Rule 17.1 of this Court. Brendale's Petition for Certiorari was timely filed on 3/31/88 and granted on 6/20/88.

STATUTES AND TREATIES INVOLVED

1. U.S. Constitution, Fifth Amendment, "Petition for Writ of Certiorari" of Philip Brendale (herein BP) p. 2.

2. U.S. Constitution, Fourteenth Amendment, Section 1, BP 2.

3. 25 USC 348, BA 219.

4. 25 USC 349, BA 227.

5. 25 USC 1302(8), BP 3.

6. Public Law 280, Section 6, Act of August 15, 1953, 67 Stat. 590, 28 USC 1360, BA 230.

7. RCW 37.12.010, BA 235.

8. Treaty with the Yakimas, BA 237.

9. 25 CFR 170.8, BP 4.

STATEMENT OF THE CASE

Petitioner-Philip Brendale (herein "Brendale" or "Petitioner") is the fee owner of 160 acres of real property situate in Yakima County, Washington, and located within the exterior boundaries of the Yakima Indian Reservation. Brendale's land was on 6/15/15 allotted pursuant to 25 USC 331, *et seq.*, to his great-aunt, Margaret Smith, an enrolled Yakima Indian. (EX 201)

When Margaret Smith died, the allotment passed to Brendale's grandfather, Morris Charles, and his mother, Carolyn Charles, each with an undivided one-half interest as tenants-in-common. Both Morris and Carolyn Charles were enrolled members of the Yakima Nation. (R 692) On 7/13/63, the United States issued an unrestricted, unencumbered fee simple patent to Morris and Carolyn Charles (EX 202).

Following the deaths of Morris and Carolyn Charles, Brendale inherited the entire 160 acres in unrestricted, unencumbered fee simple. (R 693). Although Petitioner is a direct descendant of enrolled Yakima Indians, he is not an enrolled member of the Yakima Nation and, therefore, has no voice or vote in the Yakima Nation Tribal government.

Brendale's property is located within a portion of the Yakima Indian Reservation which was, contrary to 25 CFR 170.8 and without notice or due process to fee land owners, "closed" to unenrolled members of the Yakima Nation by a 1955 tribal resolution, a 1972 U.S. Bureau of Indian Affairs (herein "BIA") "Public Notice" (EX 204, R 705), and the Yakima Nation's 1972 "Amended Zoning Regulations", Section 23 (EX 6).[1]

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[1] The invalidity of the road closure was recently affirmed by the Department of Interior's 4/08/88 "Letter Decision on Appeal of Portland Area Director's Decision Affirming the Yakima Agency Superintendent's Denial of Application by Philip Brendale, Gary Gwinn and Larry Boyd for permits to use BIA roads", printed in the Appendix, pp. 1a-5a.

The "Amended Zoning Regulations", Section 23, establishes the "reservation restricted area" in which permanent structures, except tribal camps for education and recreation of tribal members and structures constructed and occupied by the Yakima Nation or BIA in furtherance of tribal resources are purportedly prohibited.

The Yakima Indian Reservation "closed area" is located in both Klickitat and Yakima Counties and consists of approximately 807,000 acres of the 1.3 million acre reservation. Approximately 35,000 acres of the "closed area" are owned in fee simple by non-Indians and Indians and the remainder is held in trust by the United States for individual Indians and the Yakima Nation. The "closed area" *in Yakima County* contains approximately 740,000 acres of which 25,000 acres are fee simple land. (1/25/84 Deposition of Henry Williams, p. 9.)

In approximately 1900, land which the BIA and Yakima Nation has included in the "closed area" of the reservation was outside the then-established Yakima Indian Reservation boundary and was extensively homesteaded by non-Indian settlers who constructed permanent dwellings on their fee simple property. Many of these permanent dwellings are located in "Cedar Valley" near the land now owned in fee simple by Brendale (R 701, 703-705, EX 203).

Contrary to the District Court's findings, there are more than twenty (20) permanent structures in the closed area consisting of cabins and related out-buildings which are *not* associated with tribal camps or resource management. At least three (3) structures are used for private commercial enterprises, one structure is owned and occupied by a non-tribal member who acquired the property after enactment of the 1972 "Amended Zoning Ordinance" and at least one cabin has been rebuilt after being destroyed by fire after enactment of the ordinance,

all contrary to the "Amended Zoning Ordinance". (JA 24-25)

In addition, there is a 50-lot subdivision located within the closed area in which at least five (5) mobile homes have been placed after enactment of and in violation of the "Amended Zoning Ordinance" without objection from the Yakima Nation. (JA 25, EX "B" to D 143)

Since the 1940's, substantially all the forest in the reservation "closed area" has been commercially logged (R 54). Most of the timber producing land has been logged twice; some areas are being cut for the third time. (EX 228, 229, 230, 240).

The Yakima Nation's intensive, recurring commercial logging in the "closed area" surrounding Brendale's land has been routinely conducted without any previously expressed Indian concern about religious or cultural values.

In 1972, the BIA "Public Notice" (EX 204) improperly and contrary to 25 CFR 170.8, the Dawes Act and constitutional due process, closed all roads in the reservation forest area, except U.S. Highway 97, to all persons except enrolled members of the Yakima Tribe.

The notice provided the tribal council could first issue a "permit", then the BIA superintendent could issue "closed area entry permits" to non-enrolled members of the tribe: (1) doing business with the tribe, or (2) who on 5/02/72 owned land in the "closed area".

After Brendale inherited the property from his mother in June, 1972, he continued to use the BIA roads which were constructed and maintained with money from the U.S. General Treasury as he had in the past for access to his deeded property without applying for a permit, believing he had an absolute right of access, ingress and egress to his fee simple land.

In 1974, the United States filed suit against Brendale in *United States v. Brendale*, E.D. Wash. Civil No. 74-179. On 9/30/77, the District Court granted a perma-

nent injunction prohibiting Brendale's use of BIA roads without a permit. In 1977, Brendale was advised by the BIA superintendent anyone who purchased Brendale's property within the "closed area" would not be issued "entry permits" because they were not record owners of the land when the 1972 BIA "Public Notice" was issued and the 1972 tribal zoning ordinance enacted.

In 1978, Brendale filed suit in the U.S. District Court (*Brendale v. Olney,* C-78-145), to establish the right of his grantees, heirs, successors and assigns to have unlimited access to his "closed area" fee simple land.

On 3/03/81, a District Court "Memorandum Decision and Judgment" (EX 205) was entered finding an implied easement for access over the "closed" BIA roads, prohibiting the superintendent of the Yakima Indian Reservation from interfering with access to Brendale's property and granting Brendale, his invitees, successors and assigns in interest the absolute right to use BIA roads for access to Petitioner's land limited only if the conditions described in 25 CFR 162.8 (now 25 CFR 170.8) existed when restricted road use would be equally applied to all persons, including enrolled members of the Yakima tribe.

In 1981, Brendale advised the Yakima Nation he intended to sell his property to others unless it was purchased by the tribe and when no offer was received, advised the Yakima Nation he intended to plat his property for sale as mountain recreation homesites. (EX 206, 207)

In late January, 1982, Brendale filed four contiguous 40-acre short plat (subdivision) applications with the Yakima County Planning Department together with the "Environmental Checklist" required by Yakima County subdivision ordinance (EX 211, R 542-543).

Yakima County has historically exercised exclusive subdivision, land use jurisdiction over non-restricted, non-trust, fee-patent land such as Petitioner's within the

exterior boundaries, including the "closed area" of the Yakima Indian Reservation. (R 473-477, 563). The Yakima Nation did *not* in 1982 and at present does not have any regulations or procedure for subdividing (platting or short-platting) real estate. (R 136, 498-499).

The Yakima County Planning Department issued a proposed "Declaration of Non-Significance" of Brendale's short plats which was mailed to and received by the Yakima Nation Tribal Council together with the "Environmental Checklist", a map showing the location of the short plat, and a request the Yakima Nation provide the Yakima County Planning Department with its comments on the Environmental Checklist, proposed "Declaration of Non-Significance" and short plat. (R 542-543)

Yakima County received *no* comments or suggestions from the Yakima Nation about Appellant's four short plats. (R 542-543, EX 211, 212) The Environmental Checklist sent to the Yakima Tribal Council clearly indicated Appellant's eventual, intended use of the short platted land was to develop recreational homesites.

In March, 1982, Brendale advised the Yakima Nation of his completed short plats and intent to proceed with subdivision sales for development since the tribe did not appear interested in purchasing Brendale's property. Brendale then received a BIA offer to purchase his land for less than twenty percent (20%) of its fair market value. (EX 208, 209) Brendale submitted a counter-offer to the BIA and then received a letter from the Yakima Nation raising for the first time land use limitations contained in tribal zoning regulations. (EX 210)

In April, 1983, Brendale filed an application with Yakima County to subdivide twenty (20) acres of his property into ten (10) two-acre lots. Brendale proposed use of the lots for recreational cabins and travel trailer sites. (EX 122)

The filing of Brendale's subdivision application with Yakima County and Yakima County's assumption of jurisdiction to consider the application triggered this litigation.

The Yakima County Planning Department determined Brendale's proposed subdivision would *not* have a significant adverse effect on the forest environment in which the property was located and issued a "Declaration of Non-Significance" (EX 123).

The Yakima Nation appealed the Planning Department's "Declaration of Non-Significance" to the Yakima County Commissioners. After considering the Yakima Nation's contention Yakima County did not have jurisdiction to subdivide Appellant's fee land, the Commissioners (who are also defendants in this litigation) received testimony on the merits of the need for an Environmental Impact Statement.

On 8/16/83, after four (4) days of hearings, the Commissioners entered "Findings of Fact, Conclusions of Law and Order of Yakima County Commissioners" (EX 7) overruling the Planning Department's "Declaration of Non-Significance" and requiring the preparation of an Environmental Impact Statement for Brendale's plat application.

The Yakima Nation filed its Complaint in the District Court. After a hearing, the District Court granted a temporary restraining order on 9/22/83 (D 12), and orally granted a preliminary injunction on 10/17/83. The District Court's "Memorandum and Order Granting Preliminary Injunction" was entered 11/16/83. (D 42) The case was set for an expedited trial on the merits and tried between 1/30/84 and 2/02/84.

"Environmental assessments" (herein "EA") by the BIA were conducted for three (3) large Yakima tribal commercial timber sales close to Brendale's land in the early 1980's. (EX 232, 233 and 234)

The EA's concluded intensive logging in the area would have *no* significant effect on the environment even though the logging would involve the construction of new roads, use of heavy equipment, logging operations and substantial slash burning in the closed area. The EA's disclosed no sites of specific religious or cultural significance to the Yakima Nation or its members which would be impacted by the tribe's intensive logging operations. One of the EA's disclosed the existence of the partially developed "Olney Creek Campground" in the sale area and acknowledged the asphalt paved Signal Peak Road (which provides access to Petitioner's land) was already receiving heavy use. (EX 234, p. 2). Another EA acknowledged use of roads to be constructed within the sale area after the timber was logged might have a negative effect on some use of the area by elk herds. The EA did not, however, consider the effect on elk herds significant. (EX 233, p. 2). Although there was testimony at trial road use associated with Brendale's development might have some effect on deer and elk herds in the area, no evidence was presented the effect would be any greater than current substantial traffic from logging, enrolled tribal members and permittees presently using the same roads which provide access to Brendale's property. (R 407, 411-412) The Yakima Nation's witnesses testified about prospective harassment of game animals by Brendale's purchasers and their pets. Tribal members currently bring to the "closed area" dogs which are allowed to run free (R 737). Members also hunt both deer and elk all year (R 792). The adverse effect of pets owned by enrolled members and their guests currently admitted throughout the "closed area" and the year-round tribal deer and elk hunting is obviously greater than would result from people and pets on Brendale's proposed development which would be confined to their land and would have no hunting privileges.

The Yakima Nation's primary concern about Petitioner's proposed development is a prospective increase of

fire danger to the timber producing area. It was acknowledged, however, fires built by users of Brendale's development would be much less a threat to the surrounding forest than open fires in campgrounds or fires by Yakima Nation members camping outside established campgrounds. (Williams deposition, p. 53).

Evidence was also submitted about potential introduction of noxious weeds by users of Brendale's proposed development which might adversely affect timber, traditional herbs and plants (R 70). The substantial potential for introduction of noxious weeds already exists, however, because the Yakima Nation and BIA permit summer and fall grazing within the "closed area" of 7,000-8,000 head of cattle (R 259) which winter in areas containing noxious weeds (R 195-196). Hay, which was described as a major source of noxious weeds, is currently brought into the "closed area" by enrolled Indians and other permitted users (R 736). The danger of noxious weeds from activities currently permitted by the Yakima Nation and BIA indicates the potential noxious weed danger posed by users of Brendale's proposed development is insignificant.

Before Brendale's plat application and this litigation, the State of Washington and Yakima County have also exercised exclusive jurisdiction of fee land within the "closed area" through the Washington State Forest Practices Act (RCW Chap. 76.08), issuing permits for timber harvesting, chemical application, removal of forest debris, replanting and removal of land from forest management (R 605-607).

The State also imposes a "forest patrol tax" on fee land within the "closed area" which is collected by Yakima County for fire suppression on fee land within the "closed area". (R 611, EX 225).

Both the BIA and Respondent-Yakima Nation have acknowledged they have no jurisdiction over, and have not attempted to control, timber management and other

logging activities on fee land within the "closed area" of the Yakima Reservation (R 184; Williams deposition, p. 59-71).

Washington State and Yakima County real property and other taxes area assessed against the fee land in the "closed area", paid by Brendale and other fee owners and collected by Yakima County (EX 225).

SUMMARY OF ARGUMENT

1. The restriction of tribal sovereignty by treaty, statute and the tribe's dependent status, Congressional enactment of the Dawes Act, and Public Law 280, together with Washington State's enactment of RCW Chap. 37.12 assuming civil and criminal jurisdiction over non-trust fee-owned land within the Yakima Indian Reservation has completely divested the Yakima Indian Nation of jurisdiction over fee land within the reservation and vested completed, exclusive jurisdiction over non-Indian fee land in Washington State and its political subdivisions.

2. Yakima County's regulation of land use on non-trust, fee-owned land within the Yakima Indian Reservation does not threaten or have any direct effect on the political integrity, economic security, health or welfare of the Yakima Indian Nation.

3. Imposition of tribal land use jurisdiction based on the location of non-trust, fee-owned land within either the "open area" or the arbitrarily created "closed area" of the Yakima Indian Reservation is not rationally related to the preservation of the Yakima Nation's political integrity, economic security, health or welfare and results in a violation of Petitioner's and other closed area fee land owners constitutional right to equal protection as well as an unconstitutional deprivation of property without due process or compensation.

ARGUMENT

THE NINTH CIRCUIT "OPINION" CONFLICTS WITH THE LAW AS ESTABLISHED BY CONGRESS AND THE U.S. SUPREME COURT.

I. Divestiture of Yakima Nation Jurisdiction Over Deeded, Fee-Owned Land Within the Reservation.

It is undisputed Congress has the power to unilaterally limit or abrogate treaties with Indian tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Congress has, in the exercise of its power over Indian tribes and treaties, terminated the exclusive nature of the Yakima Reservation and authorized the State of Washington to assume civil and criminal jurisdiction over fee simple, non-trust land within the reservation. (28 USC 1360)

With its assumption of jurisdiction over all non-trust, non-restricted land in the Yakima Indian Reservation in 1963 pursuant to RCW Chap. 37.12, the State of Washington's jurisdiction over non-trust land within the reservation became complete and exclusive.

In 1877, Congress enacted the Dawes Act (25 USC 331, *et. seq.*) and land within the Yakima Indian Reservation was allotted to individual tribal members. The Dawes Act is applicable not only to agricultural and grazing land but also timber land now owned by Brendale. *United States v. Payne*, 264 U.S. 446, 44 S.Ct. 352 (1924). The land remained in trust for twenty-five (25) years, then a fee simple absolute patent was issued to the individual Indian allottee without any encumbrance or restriction on alienability (25 USC 348). After a fee simple patent was issued to an Indian, the Indian was subjected to the civil and criminal laws of the state in which he resided (25 USC 349).

The land which is the subject of this case was initially allotted to Petitioner's great-aunt, an enrolled Yakima

Indian, and the fee simple patent in the land was issued to Petitioner's grandfather and mother, all pursuant to the Dawes Act.

In *Montana v. United States*, 450 U.S. 544, 67 L.Ed. 2d 493, 101 S.Ct. 1245 (1981), this Court specifically recognized Congress's intent to eliminate tribal jurisdiction over land patented pursuant to the Dawes Act, stating at Note 9, 450 U.S. 559-560:

* * * *

> "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who have settled upon alienated allotted lands *would be subject to tribal regulatory authority.* Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction . . . *it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy is the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined the purpose if peaceful assimilation could be advanced if freeholders could be excluded from fishing or hunting on their acquired property." (Emphasis added)

* * * *

Although Indian tribes possess "inherent sovereignty", their sovereignty has been substantially restricted and limited by treaty, statute and the tribe's dependent status.

In *United States v. Wheeler*, 435 U.S. 313, 326, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978), this Court discussed and distinguished the inherent powers which tribes have retained and those which have been divested, stating:

* * * *

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and non-members of the tribe . . . .

"These limitations rest on the fact that the dependent status of the Indian tribe within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. The powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different type. They involve only the relations of members of the tribe. Thus they are not such powers as would necessarily be lost by virtue of the tribe's dependent status." (Emphasis added)

* * * *

The Ninth Circuit has recognized land within an Indian reservation for which a fee simple patent has been issued is subject to state and municipal regulation.

In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), the District Court held city rent control regulations could be applied to Indian land because the trust patents issued for the land would expire in 1986 and the land would become subject to all California laws pursuant to 25 USC 349.

The Ninth Circuit recognized the effect of 25 USC 349 but since the Secretary of Interior had extended the trust status to 1989, and held the land was still in trust and was not, therefore, subject to city regulatory ordinances.

Although RCW Chap. 37.12 enacted pursuant to Public Law 280 did not expressly grant the State of Washington specific zoning jurisdiction over fee-patent land within the Yakima Reservation, land use jurisdiction had been previously acquired when fee patents were issued pursuant to 25 USC 349; enactment of RCW Chap. 37.12 formalized the State's zoning jurisdiction of reservation fee patent land as complete and exclusive.

The State's complete jurisdiction of fee simple, non-Indian owned land within the Yakima Reservation for all purposes including zoning was explicitly recognized by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463, 498, 499, 58 L.Ed.2d 303, 99 S.Ct. 740 (1979):

* * * *

"State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on non-trust lands.

. . . * * * *

"The state has accepted the jurisdiction offer in Public Law 280 in a way that leaves substantial play for tribal self-government, under *a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within the reservation*, has plainly taken action within the terms of the offer made by Congress to the states in 1953." (Emphasis added).

* * * *

The Ninth Circuit clearly failed to recognize or even consider Washington State's assumption of civil jurisdiction pursuant to Public Law 280 and RCW Chap. 37.12 as being the final step in the divestiture of *all* tribal jurisdiction over deeded, non-Indian, non-trust, fee land within the Yakima Reservation consistent with the clearly expressed Congressional intent of the Dawes Act and Public Law 280.

The failure of the Ninth Circuit to accept the divestiture of the tribal zoning jurisdiction over non-trust, non-restricted fee simple land within the Yakima Reservation and resulting exclusive jurisdiction of Washington State and its political subdivision, is contrary to and a fundamental departure from the express, unambiguous holdings of this Court in *Washington v. Yakima Indian Nation*, *supra*, and *Montana v. U.S.*, *supra*.

This Court should reaffirm the allocation of jurisdiction over land within the Yakima Reservation based on whether the land is owned in fee or owned by or held in trust for the Yakima Indian Nation is a reasonable and appropriate method of accommodating the needs and rights of non-Indians within the reservation while at the same time recognizing and preserving tribal sovereignty and control over trust or tribal owned land as recognized in *Washington v. Yakima Indian Nation, supra.*

The application of land use jurisdiction based on land ownership eliminates any uncertainty about which sovereign has jurisdiction and further eliminates the need to make jurisdictional determinations on a case by case basis.

In addition, jurisdiction based on land ownership is consistent with the Dawes Act Congressional intent non-Indian landowners will be subject to state, *not* tribal authority, and also recognizes and preserves the non-Indian landowner's right to have a voice in the government which regulates his land and his activities on the land.

Land use jurisdiction based on land ownership is also consistent with preservation of the Yakima Nation's sovereignty and control over its own land. As pointed out below, the Washington State Environmental Policy Act requires land use decisionmakers consider and accommodate concerns of adjacent jurisdictions which may be affected by land use decisions. This requirement insures Yakima land use decisions will *not* be a threat to or adversely affect the Yakima Nation's political integrity, economic security, health or welfare.

The Ninth Circuit Opinion should be reversed and the Court should hold the State of Washington and Yakima County have exclusive land use jurisdiction over non-trust, non-tribal owned, fee land within the Yakima Indian Reservation.

II. The Court of Appeals Failed to Properly Apply the *Montana* Rule.

The Court of Appeals held the Yakima Nation had authority to regulate non-Indian land use of deeded, non-trust, non-tribal owned land within the Yakima Reservation. The Ninth Circuit holding is a misapplication of the test enunciated by this Court in *Montana v. United States, supra.*

In *Montana*, this Court recognized an Indian tribe's dependent status eliminated many attributes of tribal sovereignty, stating at 450 U.S. 563-564:

* * * *

> "This Court most recently reviewed the principals of inherent sovereignty in *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079. In that case, holding that Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory', Id. at 323, 55 L.Ed.2d 303, 98 S.Ct. 1079, the court upheld the power of the tribe to punish tribal members who violate tribal criminal laws. But the court was careful to note that, through their original incorporation into the United States as well as through the specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty. Id., at 326, 55 L.Ed.2d 303, 98 S.Ct. 1079. The court distinguished between those inherent powers retained by the tribes and those divested:
>
> " 'The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the *relations between an Indian tribe and non-members of the tribe.* These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.* But the powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different

type. They involve *only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.' Ibid. (Emphasis by the Court).

"Thus, in addition to the power to punish tribal offenders, the Indian tribes retained their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id. at 322, n. 18, 55 L.Ed.2d 303, 98 S.Ct. 1079. *But the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes,* and so cannot survive without express congressional delegation. (Citations omitted)." (Emphasis added)

The *Montana* Court noted two (2) factual settings in which an Indian tribe may retain the power to exercise *limited civil jurisdiction* over non-Indians on fee land within the reservation. The first, *which is not applicable in this case,* exists if non-Indians enter consensual relations with the tribe or its members. The second exists if conduct of non-Indians on fee-land threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe. *Montana v. United States,* 450 U.S. 565-566.

The Court of Appeals in both this case and *Whiteside II* improperly found denial of tribal zoning jurisdiction of non-Indian, "closed area" fee land would threaten or directly affect the tribe's health or welfare.

The Ninth Circuit erroneously relied in part on *Segundo v. City of Rancho Mirage, supra,* at p. 1393, stating: ". . . land use regulation is within the tribe's legitimate sovereign authority over its lands".

Segundo involved, however, *only trust land, not non-Indian, fee simple land.*

Although an Indian tribe's retained sovereign authority may include zoning jurisdiction *of trust land, Montana* clearly established a tribe has no jurisdiction over activities on non-Indian fee land unless one of the *Montana* exceptions exists.

Ninth Circuit application of *Segundo* to this case is plain error, clearly contrary to and in direct conflict with the U.S. Supreme Court's holding in *Montana.*

The Court of Appeals also erroneously relied on *Jurisdiction to Zone Indian Reservations,* 53 Wash.L.Rev. 677 (1978), a *Comment* written *before* this Court's decisions in *Washington v. Yakima Nation, supra,* and *Montana v. United States, supra.*

The *Comment* theme is: checkerboard jurisdiction resulting from denial of a tribe's exclusive jurisdiction to zone fee land within the reservation is undesirable and unwise.

In *Washington v. Yakima Indian Nation, supra,* this Court recognized checkerboard jurisdiction as the *only* method of harmonizing a tribe's limited sovereign authority with the rights and interests of non-Indians and states. *Washington v. Yakima Indian Nation, supra,* 439 U.S. 499, 502.

The appropriate *Montana* test to determine if Congress intended the tribe to retain sovereignty to zone fee land within the reservation is: whether or not Yakima County regulation of reservation fee land would in fact threaten or directly affect the Yakima Nation's political integrity, economic security, health or welfare.

Contrary to the Ninth Circuit's "Opinion", application of the second *Montana* exception is *not* resolved by considering whether or not "good land use planning practices" make it desirable for the tribe to have zoning jurisdiction over all land within the reservation.

The Ninth Circuit has previously acknowledged and correctly applied the *Montana* test in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

In *Anderson*, the issue was: Did Washington State or the Spokane Tribe have the authority to regulate water rights on fee land within the reservation? The *Anderson* Court concluded the tribe had no water right jurisdiction on fee land because the *Montana* exceptions were inapplicable, stating at 736 F.2d 1365:

* * * *

> "We find no *conduct which so threatens or has such a 'direct effect* on the political integrity, the economic security or the health or welfare of the tribe' as to confer tribal jurisdiction". (Emphasis added)

* * * *

Before the Yakima Nation can regulate or zone the use of Petitioner's fee land, there must be facts in the record to sustain a finding Petitioner's development and land use permitted by and subject to Washington State statute and Yakima County regulations, are a substantial threat or have a substantial direct, adverse effect on the tribe's political integrity, economic security, health or welfare. *Some intrusion on tribal interests or speculative impacts are not sufficient. United States v. Anderson, supra*, at 1336.

Yakima County land use regulations include the Washington State Environmental Policy Act, the county subdivision ordinance, zoning code and shoreline (wetland) master plan. It is clear reservation fee land development and use *subject to county regulation and state statute* are *not* a significant threat and will *not* have a significant direct or adverse effect on the Yakima Nation's political integrity, economic security, health or welfare.

The Yakima Nation initially appealed the Yakima County Planning Department's "Declaration of [Environmental] Non-Significance" of Petitioner's plat application to the Yakima County Board of Commissioners.

A hearing by the Commissioners identified fourteen (14) *potential* environmental questions (EX 7). The County Commissioners required Petitioner prepare an "Environmental Impact Statement" before County consideration of Petitioner's plat application.

The County Commissioners' findings of "potential" environmental impact were erroneously adopted by the District Court as evidence Petitioner's proposed development threatened or adversely affected tribal interests. (9/11/85 Memorandum Opinion, *Whiteside I*, BA 83-93; 2/04/84 Oral Opinion, *Whiteside I*, BA 52.)

The Commissioners' findings of "potential" impact cannot, however, be the basis for finding the Yakima Nation's interests are threatened or affected by development conducted *in compliance with county and state land use regulations.*

The Commissioners' hearing and findings unequivocally establish Petitioner's compliance with county regulations and procedures will prevent adverse impact or effect on tribal interests by development of fee land within the reservation.

Before any development, Petitioner must not only comply with the county zoning, subdivision and wetland codes but also state statutes and regulations requiring preservation of environmental, social and economic values. *Department of National Resources v. Thurston County*, 92 Wn.2d 657, 663-665, 601 P.2d 494 (1979); *Barrie v. Kitsap County*, 93 Wn. 843, 858-860, 613 P.2d 1148 (1980).

Action by Yakima County approving Petitioner's proposed development without consideration and adequate investigation of any adverse effects on the Yakima Indian Nation would be arbitrary, capricious and invalid. In *SAVE v. City of Bothel*, 89 Wn.2d 862, 869, 870, 576 P.2d 401 (1979), the Court held a rezone affecting several jurisdictions to be invalid and stated:

* * * *

"Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdiction borders, *the zoning body must serve the welfare of the entire affected community.* If it does not do so it acts in an arbitrary and capricious manner.

* * * *

"The action was arbitrary and capricious in that it failed to serve the welfare of the community as a whole. Specifically, adverse environmental effects and potentially severe financial burdens on the affected community have been completely disregarded. If it is possible to mitigate or avoid adverse environmental effects and if Bothell takes the necessary steps to do so, responsible planning for the shopping center may be reasonable. It has not acted to avoid these consequences, however, and the rezone cannot be sustained." (Emphasis added)

Washington State law clearly requires Yakima County to consider the Yakima Nation's land use policies and classifications and absolutely eliminates the possibility County land use decisions will threaten or adversely affect the Tribe's political integrity, economic security, health or welfare.

The Tribe's ability to protect its interests through State mandated procedures and, if necessary, by resort to the Federal Courts is amply demonstrated by this case. Brendale and other non-Indian landowners within the reservation have no recourse from adverse tribal land use decisions.

The Court of Appeals also erroneously failed to consider the extensive past history of county and state regulation of fee land in the reservation.

If the tribe and other parties previously acquiesced in and accepted non-Indian regulation of fee land within the reservation, there is no threat or direct effect on tribal self-government or other interests. See: *Montana v. United States, supra,* 450 U.S. 554, Fn. 13.

Yakima County and Washington State have exercised exclusive jurisdiction over land use on fee land within the reservation closed area, including Petitioner's property, before this case and *Whiteside II* were filed. In 1982 Yakima County accepted, processed and approved four (4) contiguous short plats of Petitioner's property.

The Yakima Nation did *not* object to Petitioner's short plat or county jurisdiction over Petitioner's proposal although Yakima Nation had notice of Petitioner's application, his future plans for the property and the County's "Declaration of Non-Significance".

In addition, timber production, the primary use on fee land within the reservation closed area, has been exclusively regulated and controlled by the Washington State Forest Practice Act and administrative regulations. State permits for timber cutting, chemical applications, removal of forest debris and forest practices which involve water affecting fish have been routinely required and issued by Washington State. Fee land within the timbered portion of the closed area is also subject to a "forest patrol tax" collected by Yakima County for fire suppression and control.

In this case, as in *Montana,* Washington State and Yakima County's previous, exclusive regulation of reservation closed area fee simple land and the tribe's long acquiescence in and acceptance of state and county regulation clearly establishes Yakima County's exercise of land use jursidiction on reservation fee land has not in the past and will not in the future threaten or directly affect the Yakima Nation's political integrity, economic security, health or welfare.

Other cases in which an Indian tribe has been found to have authority to impose restrictions on fee land within a reservation do *not* provide any support for the Ninth Circuit's conclusion the Yakima Nation should have zoning jurisdiction of fee land in this case.

In *Knight v. Shoshone & Arapahoe Tribes of the Wind River Reservation*, 670 F.2d 900 (10th Cir. 1983), neither the state nor county involved asserted or exercised land use jurisdiction within the exterior boundaries of the reservation. The tribe's zoning ordinance was the *only* land use regulation which controlled development on the reservation. The Court found "unregulated development" would directly affect tribal and allotted land and permitted the tribe's enforcement of its zoning ordinance on reservation fee land.

In *Chardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), the Court not only found the non-Indian landowner was engaged in "consensual" relations with the tribe through commercial dealing, but also found the non-Indian landowner's violation of the tribal building and health regulations substantially and directly affected the tribe's health or welfare. Again, as in *Knight, supra*, there is no indication there existed state or county regulation of the *Chardin* landowner's business.

In *Lummi Indian Tribe v. Hallauer*, 9 I.L.R. 3025 (W.D. Wash. 1982), the Court specifically held the lack of adequate reservation sewer system regulation had the potential for significantly affecting the economy, health and welfare of the tribe and authorized the tribe to require non-Indians to hook up to the tribe's sewer system. There is absolutely no evidence in *Lummi* the state or county had exercised land use jurisdiction of reservation fee land.

In this case, as in *Montana v. United States, supra*, and *United States v. Anderson, supra*, Yakima County's regulation of fee land within the exterior boundaries of the Yakima Reservation and Petitioner's proposed development of his fee simple property *in compliance with and subject to county and state regulations* pose no direct threat to or effect on the Yakima Nation's political integrity, economic security, health or welfare sufficient to

confer tribal zoning jurisdiction on non-Indian fee simple land.

Yakima County's assertion and exercise of land use jurisdiction over Petitioner's fee land within the Yakima reservation is, like Washington State's 1963 assumption of jurisdiction over reservation fee land pursuant to PL 280, a responsible accomodation of both Indian and non-Indian rights within the reservation consistent with this Court's prior decisions, providing state and county protection and services to non-Indian citizens living within the reservation who have no voice in tribal government but at the same time deferring to and not interfering with tribal self-government on trust or restricted land.

The Trial Court in *Whiteside II* correctly found "checkerboard" zoning and appropriate multi-jurisdictional zoning are required by today's society, whether it involves counties, cities, towns or Indian tribes. (6/08/84 Oral Opinion, *Whiteside II*, BA p. 154.)

The imposition of tribal land use-zoning regulation on reservation fee land pursuant to the Court of Appeals' "Opinion" is not necessary to serve or protect legitimate tribal interests which are not already served and protected by state and county regulation.

On the other hand, the Yakima Nation "closed area" zoning regulations approved by the Ninth Circuit destroy existing comprehensive county-state land use programs which are responsive to and accommodate both tribal and non-Indian interests.

Section 8 of the "Amended Zoning Regulations of the Yakima Indian Nation" establishes the Yakima Tribal Council as the "Board of Adjustment" to review decisions of the zoning administrator. A party aggrieved by a tribal council decision *has no right to have the decision reviewed.* Section 10 of the "Amended Zoning Regulations" entitled "Appeals from the Board of Adjustment", provides:

"Nothing in this ordinance shall be construed to be a waiver of sovereign immunity by the Yakima Nation, and its officers and agents."

Exclusive tribal zoning jurisdiction would also, therefore, subject non-Indian citizens and landowners on the reservation to regulation by a tribal government in which they are prohibited from participation and to adverse decisions from which there is no judicial review.

Such exclusive and uncontrolled power by the Tribe over non-Indian fee land is subject to abuse by the tribal government, a fact demonstrated by the Yakima Nation's unreasonably low offer to purchase Brendale's property based on the land use limitations imposed by the Tribe's zoning regulations (EX 210).

Proper application of *Montana* requires reversal of the Ninth Circuit and the determination Brendale's property is subject to the exclusive jurisdiction of Washington State and Yakima County.

III. Violation of Due Process and Equal Protection.

The District Court's decision in this case (*Whiteside I*) and its later decision in the companion, consolidated *Whiteside II* case erroneously create two (2) classes of fee simple land owners within the exterior boundaries of the Yakima Reservation based on location of land without a reasonable basis for the classification.

The Court of Appeals also discussed and decided the issue of exclusive Yakima Nation zoning jurisdiction based on an unconstitutional classification of land in the reservation "open" and "closed" areas holding the Yakima Nation has exclusive jurisdiction of the "closed" area and remanding the issue of Yakima Nation's exclusive zoning jurisdiction in the "open" area to the District Court for additional findings of fact.

Creation of the "closed area" by 1955 tribal resolution, 1972 BIA "Public Notice" contrary to 25 CFR 170.8 and perpetuation of it by Yakima Nation's 1972 zoning ordinance are also an unconstitutional, unlawful deprivation of Petitioner and other fee owners' due process, equal protection and just compensation rights.

The District Court and Ninth Circuit Court of Appeals have erroneously adopted in *Whiteside I and II* the Yakima Nation and BIA's previous unlawful acts creating unconstitutional classification and have erroneously affirmed their violation of Petitioner's due process, equal protection and just compensation rights.

The Fifth Amendment of the U.S. Constitution imposes the requirement of providing equal justice and law on the federal government; it subjects federal actions to the same requirements imposed on the states by the Fourteenth Amendment equal protection clause. *Hampton v. Mow Son Wong*, 426 U.S. 88, 48 L.Ed.2d 495, 96 S.Ct. 1895, 1903-1904 (1976).

The Fifth Amendment equal protection requirements apply to federal court acts and decisions. See: *United States v. Cross*, 708 F.2d 631 (11th Cir. 1983). Tribal acts and decisions are also subject to the same standards pursuant to the Indian Civil Rights Act, 25 USC 1302(8).

To satisfy equal protection requirements, different classifications of similarly situated persons and land must bear a rational relationship to a legitimate government objective. See: *Queets Band of Indians v. State of Washington*, 765 F.2d 1399 (9th Cir. 1985).

The District Court in this case (*Whiteside I*) determined "closed area" fee owned land was subject to the Yakima Nation's exclusive zoning jurisdiction. The District Court later held in *Whiteside II* "open area" fee land within the exterior boundaries of the reservation but outside the "closed area" was subject to Washington State and Yakima County's exclusive zoning jurisdiction.

In both cases, the apparent governmental objective was the preservation of the Yakima Nation's political integrity, economic security, health and welfare.

No evidence was introduced in this case to show how the boundary of the "closed area" was established or what relation, if any, the boundary of the "closed area" had to preservation of the Yakima Nation's political integrity, economic security, health or welfare.

The classification of fee owned land based on its geographic location inside or outside the "closed area" of the reservation is not, however, rationally related to the stated objective.

The District Court subjected Petitioner's property and other reservation "closed area" fee land to the Yakima Nation's zoning jurisdiction "to preserve the area's religious and cultural significance".

The Yakima Nation's archeologist testified about 62 sites of religious or cultural significance he had located within the reservation. Most of the sites are along the Yakima River (TR 781-782) *outside* the reservation "closed area". The largest concentration of sites in the "closed area" in along the extreme eastern boundary (TR 778-779), *a very substantial distance from Petitioner's land.*

The result of the conflicting decisions in *Whiteside I and II* is to judicially require different land use regulations for similarly situated individuals and land based on the location of their land within the arbitrarily created "open" or "closed" areas of the reservation, *a classification unrelated to preservation of the Yakima Nation's political integrity, economic security, health and welfare.*

Non-Indian fee-owned land in the "open area" along the Yakima River where the largest number of religious and culturally significant sites are located is subject to

Washington State and Yakima County land use jurisdiction.

Brendale's land, located in the "closed area" far from any significant concentration or presence of religious or cultural sites and which has been logged over at least twice (the last time after a BIA "environmental assessment" found no religious or culturally significant sites in the area) is, however, subject to the Yakima Nation's exclusive land use jurisdiction.

Creation of the "closed area", classification and subjection of fee-owned land to land use jurisdiction based on its geographic location within the Yakima Indian Reservation do not bear any rational relationship to preservation of Yakima Nation's political integrity, economic security, health or welfare and violate Brendale's constitutional rights.

CONCLUSION

The Court of Appeals' decision in this case disregards Congress's express declaration land allotted and patented pursuant to the Dawes Act would be subject to state law and regulation as well as this Court's prior unambiguous holding in *Washington v. Yakima Indian Nation, supra,* of Washington State's complete civil jurisdiction of non-trust, fee simple land within the Yakima Reservation.

The Court of Appeals has misconstrued and misapplied this Court's decision in *Montana v. United States, supra,* in a manner which will disrupt a well-established county and state land use program although the county's exercise of land use jurisdiction does not result in any significant threat or have a direct effect on the Yakima Nation's political integrity, economic security, health or welfare.

Yakima Nation zoning regulation of fee-owned land within the Yakima Reservation based on whether or not the land is within the reservation "closed" or "open"

areas and Yakima Nation-BIA creation and perpetuation of the "closed" area have no rational relation to the protection of the Yakima Nation's limited sovereignty and violate due process, equal protection and just compensation provisions of the U.S. Constitution as well as the Indian Civil Rights Act.

Potential application of this case to other Indian reservations containing fee land and non-Indian landowners within the reservation requires this Court's reversal of the Court of Appeals' 9/21/87 "Opinion", the District Court's 9/11/85 "Judgement" and reaffirmation of *Montana v. United States, supra.*

Respectfully submitted,

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September 2, 1988

APPENDIX

APPENDIX

BIA.IA.0600 April 8, 1988

Patrick Andreotti, Esquire
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Yakima, Washington 98901

Re: Appeal of Portland Area Director's decision affirming the Yakima Agency Superintendent's denial of applications by Philip Brendale, Gary Gwinn and Larry Boyd for permits to use BIA roads

Dear Mr. Andreotti:

This letter is the decision of the Assistant Secretary—Indian Affairs on your appeal dated May 2, 1986, from the decision of the Portland Area Director of the Bureau of Indian Affairs affirming the decision of the BIA Yakima Agency Superintendent to deny the applications for road use permits by your clients, Philip Brendale, Gary Gwinn and Larry Boyd, based on a determination by the Yakima Tribal Zoning Administrator that your clients are in violation of the zoning regulations of the Yakima Indian Nation. For the reasons set out below, I have concluded that BIA officials are not authorized to deny access to the roads involved in this appeal because of alleged violations of tribal zoning laws.

On May 3, 1972, the Superintendent of the Yakima Agency issued a public notice closing most of the roads in a portion of the Yakima Indian Reservation to public travel. That notice stated the reasons for the closure:

> The closure is necessary to carry out the provisions of the Treaty which set aside the Reservation for the exclusive use and benefit of the Yakima Nation; and to protect the public safety, prevent and suppress

> fires, protect tribal fish and game and other resources, and protect unstable road beds, pursuant to 25 CFR 162.6 [now 25 CFR § 170.8 (1987)].

The notice stated that, except for tribal members, no one could use the roads without a permit issued by the Yakima Indian Nation and the BIA. It also announced that permits would be issued only to property owners in the closed area, persons employed by or doing business with the BIA or the Yakima Nation, "and to others who are engaged in activities of direct benefit to the Yakima Nation".

On August 19, 1974, the United States sued one of the appellants, Mr. Brendale, and his wife urging that they be enjoined from using the BIA roads because they refused to agree not to carry firearms into the closed area. Mr. Brendale, who is not a member of the Yakima Nation, owned land within the closed portion of the reservation.

On September 30, 1977, the court granted the injunction. It concluded that, given that tribal members had hunting rights on the reservation that are not shared by non-Indians, it was reasonable for the BIA to prevent non-Indians from carrying firearms in the closed area. *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977). The court cited *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. 1965), for the proposition that the BIA may restrict access by non-Indian landowners who have no easement across Indian lands. In that case, the BIA blocked access on the ground that the heavy equipment involved would cause damage to the unstable roadbed. *Id.* at 35-36.

In 1978, Mr. Brendale filed a new action alleging that he did have an easement over Indian lands. The court held that Mr. Brendale, his invitees, and his successors and assigns in interest had the right to use the BIA roads so long as that use is consistent with the reasonable use of the land and so long as there have not been general access restrictions placed on the roads under 25 CFR § 170.8(a). *Brendale vs. Olney*, No. C-78-145 (U.S.D.C. E.D. Wash., March 3, 1981).

Section 170.8(a) provides that BIA roads are, in most instances, open to the public:

> Free public use is required on roads eligible for construction and maintenance with Federal funds under this part. When required for public safety, fire prevention or suppression, or fish or game protection, or to prevent damage to unstable roadbed, the Commissioner may restrict the use of them or may close them to public use.

In 1983, Congress amended the term "Indian reservation roads" in the Federal-Aid Highways Act to include public roads only. 23 U.S.C. § 101(a). H. Rep. No. 97-555, 97th Cong., 2d Sess. 129 (1982).

In 1983, the Yakima Indian Nation filed another action in federal court seeking an injunction preventing Yakima County officials from authorizing Mr. Brendale to develop his property in a manner contrary to the Yakima Nation's zoning ordinance. The Yakima Nation prevailed in the federal district court and that decision was recently upheld on appeal. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987) (*Whiteside*).

On December 19, 1984, you wrote the Yakima Agency Superintendent that Mr. Brendale had sold a portion of his property in the closed area to Gary Gwinn and leased another portion to Larry Boyd. You asked the Superintendent to issue road use permits to both Mr. Gwinn and Mr. Boyd. On December 24, 1984, the Superintendent requested the Yakima Nation Zoning Administrator to review your request "for compliance with Tribal Zoning". On January 23, 1985, the Zoning Administrator

wrote the Superintendent that subdivision of Mr. Brendale's property violated the tribal zoning ordinance.

The Superintendent denied your request by letter dated February 15, 1985. He asserted, based on the March 2, 1981, decision in *Brendale vs. Olney*, that the right to use BIA roads as access to the Brendale property was contingent on that property being used in a reasonable manner. He accepted the Zoning Administrator's determination as establishing that the property was being used in violation of tribal zoning laws and concluded that such use is unreasonable.

On April 12, 1985, you appealed the Superintendent's decision to the Portland Area Director, but asked for a stay pending the district court decision in the *Whiteside* case. The district court ruled for the Yakima Tribe in that case on September 11, 1985. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735 (E.D. Wash. 1985). The Area Director affirmed the Superintendent's decision on March 3, 1986, and you appealed to this office on May 2, 1986. The district court decision in *Whiteside* was affirmed by the Ninth circuit on September 21, 1987.

The decision of both the Superintendent and the Area Director are based on a negative implication from the 1981 federal district court ruling in *Brendale v. Olney*, which provided that Mr. Brendale could use the BIA roads so long as his use was consistent "with the reasonable use of the land". Both the Superintendent and Area Director conclude that if Mr. Brendale is found to be using his land in an unreasonable manner, he no longer has the right to use the BIA roads.

The Court, however, did not address the fact that the BIA regulations mandate "free public use" of BIA roads. 25 CFR § 170.8(a). After the court ruled, Congress provided in 1983 that federally-funded Indian reservation roads must be public roads. 23 U.S.C. § 101(a). If a

road is a public road a traveller need not have an easement in order to use it. *See Grosz v. Andrus*, 556 F.2d 972 (9th Cir. 1977); *United States v. 10.0 Acres*, 533 F.2d 1092 (9th Cir. 1976); *United States v. City of Tacoma*, 330 F.2d 153 (9th Cir. 1964).

The only reasons for which the BIA may close a public road or restrict access to it are set out in 25 CFR § 170(a).

Significantly, the only federal court cases of which we are aware in which the court upheld a BIA closure of a public road involved closures for one of the purposes listed in § 170.8(a). In *Superior Oil Co. v. United States*, the public road was closed to prevent damage to an unstable roadbed. In *United States v. Brendale*, No. C-74-197 (U.S.D.C. E.D. Wash., September 30, 1977), persons who were not authorized to hunt game were prohibited from carrying firearms on BIA roads.

Because the enforcement of tribal zoning laws is not among the permissible reasons for the BIA to restrict access to a public road listed in § 170.8(a), the decisions of the Area Director and the Superintendent to prohibit your clients from using BIA roads to gain access to their property are reversed. This decision is final for the Department.

Sincerely,

JAMES S. BERGMANN
Acting Assistant Secretary
—Indian Affairs